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LEGAL CAUSE.

A wrongful act or omission has occurred, and harm has been suffered. Will the law treat the one as the cause of the other? My thesis is that it neither is nor should be possible to extract from the cases rules which cover the subject and are definite enough to solve cases; that the solution of cases depends upon a balancing of considerations which tend to show that it is, or is not, reasonable or just to treat the act as the cause of the harm—that is, upon a balancing of conflicting interests, individual and social; that these considerations are indefinite in number and value, and incommensurable; that legal cause is justly attachable cause. I believe that, while logic is useful in the premises, it is inadequate; that intuition is necessary and certainty impossible.

The view that nothing very definite can be made of legal cause is not new,[1] but neither is it fully established. A recent attempt at definiteness has been made by Professor Beale, in his article on "The Proximate Consequences of an Act." [2]

[1] Jeremiah Smith showed that the attempts which had been made, at the time he wrote, to make definite rules for the subject had all "resulted in propounding rules which are demonstrably erroneous." 25 HARV. L. REV. 317. Cf. Pollock, Torts (11 ed.) p. 35: C. B. Labatt, 33 CAN. L. JOUR. 713; 25 HARV. L. REV. 308, 309.

[2] 33 HARV. L. REV. 633.

PROFESSOR BEALE'S SYSTEM OF LEGAL CAUSE.

According to Professor Beale:

1. Legal consequences are proximate consequences: [3] and proximate means "logically direct, direct in causal sequence." [4]

2. (a) "A direct result of an active force is always proximate," but (b) "the direct result of a *passive* cause is not necessarily proximate." [5]

3. "Though there is an active force intervening after defendant's act, the result will nevertheless be proximate if the defendant's act actively caused the intervening force." [6]

4. (a) "If the defendant's active force has come to rest, but in a dangerous position, creating a new or increasing an existing risk of loss, and the foreseen danger comes to pass, operating harmfully on the condition created by defendant and causing the risked loss, we say that the injury thereby created is a proximate consequence of the defendant's act"; [7]

(b) "On the other hand, where defendant's active force has come to rest in a position of apparent safety, the court will follow it no longer; if some new force later combines with this condition to create harm, the result is remote from defendant's act." [8]

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[3] This seems to be nowhere distinctly stated, but it is implied. Thus, the article is entitled "The Proximate Consequences of an Act"; and "it is the purpose of this article to suggest certain more definite principles of law by which the determination of proximity is to be regulated" (p. 636).

[4] Page 642. *Cf.* "The proximity called for by the principle under discussion is proximity in causation; too many new causes must not intervene between the human act and the result under consideration" (p. 643); and "The active force which brings about the result without the intervention—the subsequent coming into action—of any other force is a direct cause of the result. All other forces are indirect" (p. 641).

[5] Pages 644, 645.

[6] Page 646.

[7] Page 650.

[8] Page 651.

Professor Beale's own summary, at the close of his article, is rather too compact to serve as the basis of a detailed study of his system. It follows:

"To sum up the requirements of proximity of result:

1. The defendant must have acted (or failed to act) in violation of a duty.

2. The force thus created must (a) have remained active itself or created another *force* which remained active until it directly caused the result; or (b) have created a new active *risk* of being acted upon by the active force that caused the result." Page 658.

AMBIGUITY OF "PROXIMATE."

Is it well to use the term "proximate" in connection with legal cause? I submit that this word, besides begging the question, is so ambiguous that it is almost impossible to use it consistently, and that it should therefore be abandoned, even if legal consequences were (as they are not) logically direct consequences. It is common, in speaking of causation, to give to the word "proximate" the sense of legal and at the same time to deprive it of all other sense. But Professor Beale does not intend to use the word in this purely conventional way. By proximate he means "logically direct"; and by logically direct he means either that no new cause must intervene,[9] or that "too many new causes" must not intervene,[10] between the act and the result. Yet repeatedly this logically-direct sense of proximate is lost sight of, and the word is used as a mere synonym of legal.[11] The ideas which the word conceals and confuses are much more readily grasped and handled if we say legal when we mean legal, and direct when we mean direct.[12]

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[9] Page 641.

[10] Page 643.

[11] For example: "It is to be noticed that the direct result of a *passive* cause is not necessarily proximate; proximity of result following primarily the active line" (p. 645). If proximate were used in this sentence in the sense of logically direct, the sentence would mean, the direct result of a passive cause is not necessarily direct. Again, "Though there is an active force intervening after defendant's act, the result will nevertheless be proximate if the defendant's act actively caused the intervening force" (p. 646). But the circumstances that the defendant's act did or did not cause the intervening force can have nothing to do with the question whether the ultimate result is a *direct* consequence of the defendant's act; it may affect the question whether it is a *legal* consequence.

In two successive and closely related sentences proximate appears to be used first in the sense of direct and then in the sense of legal. "Since, as we have seen, the closest causal connection possible is that between an active force and its direct result, whatever consequences may be proximate certainly this one must be" (p. 644). Proximate here apparently means direct. The premise deals with logic, not law, and the conclusion seems to be not a legal but a logical conclusion. But the next sentence is: "It is well settled, therefore, that a direct result of an active force is always proximate. Several classes of cases illustrate this principle." Abstracts and citations follow. Clearly, it is a legal proposition that is offered here; that a direct result of an active force is always a *legal* result—one recognized by law.

[12] Cf. Jeremiah Smith, 25 HARV. L. REV. 106 ff.

Ambiguity of "Direct."

It is the express purpose of Professor Beale's article "to suggest certain more definite principles of law by which the determination of proximity is to be regulated." [13] Are his propositions really definite? It is submitted that the most specific of them contain words of the greatest vagueness.

One of these vague words is the word "direct." If logical directness is a definite idea, reasonable people in applying the criterion to particular cases will generally agree; but a consideration of some of the cases put by Professor Beale as examples of direct results tends to show that no such agreement can be looked for.[14] Take *Hill v. Winsor*,[15] which he states thus:

> "Defendant with his tug wrongfully ran against a pile in the river; the force was transmitted through intervening piles until it threw out a brace to keep two piles apart, and plaintiff's leg was caught between these two piles. This was a direct and proximate result of defendant's act." [15a]

Is the result really direct? To me it would seem that the direct cause of the plaintiff's leg being caught between two piles was the springing together of those two piles; that the direct cause of their springing together was the dropping out of the brace which held them apart; that the direct cause of the dropping of the brace was the jarring of one or both of those two piles; that the direct cause of the jar was the impact, upon the pile jarred, of the next preceding pile; and so on back to the pile which the tug struck; and that the striking of the first pile must itself have been a more or less indirect result of some act which defendant did in the management of the tug. The direct cause of the injury to the plaintiff—the springing together of the two piles which had been held apart by a brace—was not even an indirect and transmitted form of defendant's force; it was a

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[13] 33 Harv. L. Rev. 636.

[14] It should be remembered in considering these cases that Professor Beale intends them to illustrate, not directness in time or place, but logical directness (p. 642).

[15] 118 Mass. 251 (1875).

[15a] Page 644.

force inherent in the piles as they stood, which force was released as a highly indirect consequence of the defendant's act. Other examples are given in the note.[16] Doubtless some will disagree, in some of these instances, with my impression that the causation involved is indirect; but, so far as the definiteness of the directness test is concerned, the question is not whether Professor Beale is right and I am wrong in some or all of these cases. The question is, is he so clearly right that reasonable people, with something like unanimity, would agree with him? If not, directness is apparently not a definite test, because not a test capable of being applied to particular cases with results that can be foretold. Is not directness a matter of degree? In most cases of causation, as in those just considered, the connection between the defendant's act and the plaintiff's injury may well be regarded either as involving a single step, or as involving several steps. The question is simply how far one's taste will take him in the subdivision of what is indefinitely, or infinitely, subdivisible. Tastes differ. While Professor Beale thinks of many cases of causation as direct, some writers think of few cases as direct. "The principal cause seldom or never produces the consequence directly, but through a chain of intermediate causes, each of which is a consequence of the preceding one and

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[16] "Fire against which defendant had insured short-circuited a machine, and thus caused such rapidity of action as to wreck the machine. The fire was a direct and proximate cause of the injury" (p. 644). My idea of an injury directly caused by fire is an injury by heat; burning, charring, warping, discoloring, etc. I should say that the fire, in the case put, was a distinctly indirect (though a legal) cause of the injury; that the direct cause of the injury was the rapid action of the machine; that the direct cause of the machine was directly caused by short-circuiting; and that it was the short-circuiting, and neither of the subsequent events, which was directly caused by the fire.

Under sub-head (d) of direct results, "Injury caused through the creation and later development of a septic or diseased condition" (p. 645), are classified cases "where defendant negligently caused a physical injury, the immediate effect of which was the insanity of the injured person, who in a fit of insane mania committed suicide." One may well agree that the defendant should be held and that the courts do ill in relieving him of liability, without agreeing that the death is a *direct* result of the original physical injury. Is not the death the more or less direct result of the suicide's act in pulling the trigger or the like, that act being the more or less direct result of the insanity and the insanity the more or less direct result of the defendant's injury?

a cause of the next." [17] "An act is always a voluntary muscular contraction, and nothing else. The chain of physical sequences which it sets in motion or directs to the plaintiff's harm is no part of it, and very generally a long train of such sequences intervenes." [18] That the directness test cannot be applied by the yard, but depends in its application upon the vagaries of taste, is not of itself a conclusive objection to it, but it does show that the merit of definiteness cannot well be claimed for it.

Directness Not Necessary to Legal Cause.

Is logical directness actually the test of legal cause? It has often been assumed that it is. That is the assumption behind the common use of the expression "proximate cause" in place of legal cause. Yet it scarcely needs demonstration that the law frequently recognizes indirect consequences as legally caused. Perhaps no one would, in terms, contend the contrary; the fact is so clear that it is scarcely possible seriously to contend the contrary except in the veiled form that the law regards only "proximate" consequences. Defendants are of course constantly being held for results which follow quite indirectly from their acts.

"Active" and "Passive" Causes.

Logical directness, then, is not necessary to legal cause. Is it sufficient? Is it true that all logically direct consequences are legal consequences? Professor Beale says that "the direct result of a *passive* cause is not necessarily proximate" [19] (meaning legal), but that "a direct result of an active force is always proximate." [20]

This introduces a new ambiguity. What is the distinction between an "active" force or cause and a "passive" one? Most

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[17] Henry T. Terry, "Proximate Consequences in the Law of Torts," 28 Harv. L. Rev. 10, 20.

[18] Holmes, "The Common Law" (p. 91); quoted by Professor Cook, 26 Yale L. Jour. 648.

[19] Page 645.

[20] Page 644.

of Professor Beale's major propositions contain one of these words, and he states that "the study of proximate causation will prove to be a study of activity of force or of risk";[21] but in spite of the importance of the words "active" and "passive" in his system, they are not defined.

The phrase "active cause" has been used before in discussions of legal cause, but in a frankly indefinite sense, apparently equivalent to Professor Smith's "substantial factor"; *i. e.*, so important in the production of a result as reasonably to be considered a legal cause.[22] In his article on "The Proximate Consequences of an Act,"[23] on the other hand, Professor Beale apparently intends the word "active" to convey a more definite idea.[24] The question remains, in *what* definite sense are the words "active" and "passive" to be understood? Sometimes[25] the word "condition" appears to be used as equivalent to passive cause. It has repeatedly been pointed out that the distinction sometimes attempted between cause and condition is "simply a restatement of the original problem in a different form of words."[26] Moreover, Professor Beale can hardly intend to

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[21] Page 641.

[22] "Each of these prior cases has had an immediate and important effect upon later consequences; but its importance has gradually declined until it finally ceased to be a practically active cause. It is now only remotely the cause of succeeding consequences. Only such causes can be regarded as proximate for the sake of fixing legal responsibility for them, as are still regarded by the law, in view of its own purpose, as active in the result in question." Sedgwick, Damages (9 ed.) (by Professor Beale and A. G. Sedgwick), Sec. 115a.

"A drove B out of a house on a freezing night, and B was frozen; . . . If B might have found shelter elsewhere, A's act of thrusting B into the cold ceased to be an active agency in keeping him in it." Professor Beale, "Recovery for Consequences of an Act," 9 HARV. L. REV. 80, 85.

Cf. Jeremiah Smith, 25 HARV. L. REV. 310, 311.

[23] 33 HARV. L. REV. 633.

[24] It is the express purpose of his article to "suggest certain more definite principles of law by which the determination of proximity is to be regulated" (p. 636). And in the propositions, "a direct result of an active force is always proximate," and "the direct result of a *passive* cause is not necessarily proximate" (pp. 644, 645), the distinction intended between active and passive can hardly be that between a force which is, and one which is not, playing an important part in the production of the result.

[25] As in the proposition which I have numbered 4; p. 212 above.

[26] Jeremiah Smith, 25 HARV. L. REV. 110. Cf. 1 Jaggard, Torts, 64, quoted by Smith; and Professor Bingham in 9 COL. L. REV. 144.

revive under new names this discredited distinction, as a "condition" in the usage just referred to meant a cause which was not a legal cause, while Professor Beale by no means excludes the possibility of a "passive cause" being a legal cause. The most helpful intimation as to the intended sense of the words "active" and "passive" is to the effect that when an active force is "spent" it becomes, or may become, a passive force.[27] Accordingly, the active forces which have "come to rest" [28] are, presumably, passive forces thereafter.

The most intelligible meaning which can be given to a distinction between active and passive forces would seem to be this, that an active force is one which is, and a passive force one which is not, continuously producing change from the time of its creation to the time of its producing a given effect.[29] This sense fits the general language of the article better than any other definite sense which has occurred to me, and I know of no other which fits more of the illustrations; yet in many of the cases in which Professor Beale speaks of an intervening force as "actively caused" by defendant's act, there is nothing to suggest that the act produced change continuously until the force was exerted.[30] I doubt if the actual use of the words "active" and "passive" in the article conforms to any objective standard.

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[27] Page 641.

[28] Pages 650, 651.

[29] Among the definitions of active in the Century Dictionary, only the first and fifth seem of possible interest here. The one comes, briefly, to this—capable of producing change; the other to this—actually producing change. But everything that operates as a cause is, by hypothesis, (1) capable of producing change, and (2) actually producing it at the moment when the effect is produced.

[30] *e. g.*, "The simplest case of this sort would be an effective request to the intervening party to act, as in the typical case of A employing B to kill C, or of A commissioning B to make a contract with C" (p. 646).

"The defendant published a newspaper, in which he printed an advertisement of obscene literature for sale. X ordered the literature in response to the advertisement" (p. 646).

Cases of defensive action of a person whom the defendant has injured, or of a third person (pp. 647, 648), appear to be presented as illustrations of the "active" causation of intervening forces; yet it is obvious that the defendant's act does not in all these cases continuously produce change until the intervention occurs. For example, "Defendant wrongfully took plaintiff's horse and wagon; plaintiff spent time and money in looking for his property. This expense was a proximate result of defendant's act" (p. 647). "Defendant

Even if definite meanings were attached to the words "active" and "passive," it does not appear that anything of importance would be found to turn upon the distinction. It does not appear that the law is much more likely to recognize an act as a cause when it has remained "active," in the sense of continuously producing change or in any other definite sense, than when it has not; though there may perhaps be some slight tendency in that direction.[31] It would no doubt be possible to cite cases in

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wrongfully placed an obstruction across that part of a road used as a carriage-road; some one to clear the road removed the obstruction to the footpath; plaintiff, using the footpath in the dark, ran against the obstruction and was injured" (p. 647). "Defendant wrongfully filled plaintiff's cellar with explosive illuminating gas; plaintiff sent a plumber into the cellar to find the leak. The plumber lit a match to find the leak, and the gas exploded, damaging plaintiff's house" (p. 648). "Defendant wounds plaintiff, who calls a physician to cure him; the physician, whether carefully or negligently, does an act which injures plaintiff; this is a proximate result of the wound" (p. 649).

If the definition of active which I have suggested be applied, it would seem that no one of these cases illustrates what it purports to illustrate—causation by an active force "actively caused" by defendant's act—but all of them illustrate causation by a passive force in which "defendant's active force has come to rest, but in a dangerous position, creating a new or increasing an existing risk of loss" (p. 650). On the other hand, it would seem that some of the cases which are classified in Professor Beale's article under the latter head should rather be placed under the former. For example: "A sick seaman was sent aloft by the master of the vessel, it being apparent that he was in danger there; the seaman by reason of his weakness fell overboard." The sailor's action in response to the master's order may safely be assumed to have been about as continuous as possible from the time of the order to the time of the fall.

And it makes a great deal of difference, in Professor Beale's system, in which of these categories a case is placed. If "defendant's active force has come to rest, but in a dangerous position," defendant's act is a cause of the ultimate injury only if the intervening force, which immediately caused the injury, was one to the risk of which defendant's act exposed the victim, and if, further, the loss which the victim suffered was a "risked loss" (p. 650, and proposition 4a above, p. 212); on the other hand, if "defendant's act actively caused the intervening force," this without more makes his act a legal cause of the ultimate result, so that it is evidently immaterial whether the intervening force and the ultimate result were *risked* or not (p. 646, and proposition 3 above, p. 212).

[31] The case which Professor Beale offers as supporting his discrimination against passive causes has little tendency to support it: "Where a train stood more than five minutes across a highway, in violation of law, and plaintiff's automobile driving along the highway collided with it, the position of the train was held not to be a proximate cause of the collision, but 'only a condition'" (p. 645). The case cited, Gilman v. Centr. Vt. Ry., 93 Vt. 340, 107 Atl. 122 (1919), seems to have been one in which the defendant's wrongful conduct had nothing to do with producing the harm—was not a "but—for cause," or any sort of cause, active or passive, of the harm. The court said: "The damage to the car was occasioned by the train starting just as the car

which an "active" cause has been selected as the legal cause in preference to a "passive" cause; on the other hand, courts sometimes select a cause which seems relatively "passive" in preference to one which seems "active." A striking, though confused, recent case of this latter sort is *Mendelson v. Davis, Director General of Railroads.*[32] Defendant's train gave a sudden lurch, which threw plaintiff through an open vestibule door. Defendant was not responsible for the fact that the door was open. It was held, *inter alia,* that it was the open door, and not the lurch, which "proximately" caused plaintiff's precipitation from the train, and that he therefore could not recover.

Directness Not Sufficient for Legal Cause.

Subject to the comment that the concept of directness is a vague one, a direct consequence is likely to be a legal consequence. But directness, though important, is not conclusive. The cases do not support the proposition that "a direct result of an active force is always proximate," [33] even if the word "active" is interpreted as confining the phrase to cases of continuous change.[34] Many cases require something in addition to directness; most frequently, foreseeability.[35] One recent case of this sort is the one just discussed, *Mendelson v. Davis, Director General of Railroads.*[36]

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struck it . . . Concededly it was moving, or on the point of moving, at the time the plaintiff ran into it . . . Assuming that the train had occupied the crossing for an unlawful length of time, plaintiff was not injured thereby."

[32] 281 Fed. 18 (C. C. A. 8th, 1922). One of the three judges concurred in the result without expressing an opinion on the question of legal cause.

[33] Page 644.

[34] Professor Beale duly notes that "In Pennsylvania, in cases of every sort, the courts have usually refused to regard the direct result of an active force as proximate unless it is foreseeable" (p. 649).

[35] It should be borne in mind that two or more active forces may concur in directly producing a result; a "result is the direct result of the active force or forces which last acted upon the immediately precedent condition" (p. 641). The fact that an active force other than the defendant's is directly at work in producing the result does not show that his force has ceased to be active, or that its part is indirect. Take the case of a head-on collision; the movement of each body is an active and direct cause of the collision.

[36] 281 Fed. 18 (C. C. A. 8th, 1922).

D in driving "cut a corner" in violation of statute; this brought him on the left side of the street, where he collided with P. Held, the evidence supported the finding that D's act in driving on the left side was not a legal cause of the collision, since it could not be "said as a matter of law that the driver of the truck should have anticipated a collision." [37]

A was struck and killed by D's negligently driven truck. A vehicle driven by X first struck A and threw him against, or into the path of, the truck. Held, D's negligent driving was not a legal cause of the death.[38]

P in his automobile collided with D's passenger train at a crossing. P was exceeding the speed limit, and could not stop promptly. The track had not been used for passenger trains until the day of the accident. Held, that P's unlawful speed was not a legal cause of the collision, and so did not bar recovery, because "it cannot be said, in the light of all the facts and circumstances, that the injury was such as ought reasonably to have been anticipated by appellee." [39]

P slipped on a wet spot close to D's revolving circular saw, and was cut by the saw. Held, *inter alia,* that the operation of the saw close to the wet spot was not a legal cause of the injury, as the injury was not foreseeable.[40]

P occupied the lower floor of a building; X occupied an upper floor. The water was shut off from the building. X opened a tap in his apartment and left it open. D turned the water into the building without investigation, and it ran out through X's tap and injured P's goods. Held, *inter alia,* that D's act was not a legal cause of P's injury.[41]

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[37] Smith v. Taylor-Button Co., 190 N. W. 999 (Wis., 1922).

[38] On the ground that the act of X "intervened" and could not have been foreseen by D. The real question perhaps was whether the defendant was negligent, though the court discussed it as a question of causation. Johnson v. City of Omaha, 188 N. W. 122 (Neb., 1922).

[39] Payne v. Young, 241 S. W. 1094 (Tex. Civ. App., 1922). Cf. Sears v. Texas & N. O. Ry. Co., 247 S. W. 602 (Tex. Civ. App., 1922).

[40] Wilbourn v. Charleston Cooperage Co., 127 Miss. 290, 90 So. 9 (1921).

[41] Nunan v. Bennett, 184 Ky. 591, 212 S. W. 570 (1919). The court states that an act is the "proximate" cause of all direct injuries, whether foreseen or not; yet the actual decision is to the contrary, as few things could be more direct than the downward flow of water from an open tap when water is turned into the pipe. The case illustrates the uncertainty of a test which turns on "directness," as well as the fact that a direct consequence is not always a legal one.

A, an engineer, negligently drove his train toward a crossing over D's track while D's train was passing over the crossing. D, after clearing the crossing, suddenly backed his train and it collided with A's engine. Held, A's negligence was not a legal cause of the collision.[42]

D, a railway company, wrongfully ejected P from its train. In the excitement he forgot his race-glasses and left them behind. Held, the ejection was not a legal cause of the loss of the glasses.[43]

D negligently started a fire. While it was active, an unusually strong wind which was already blowing when the fire was started,[44] or a wind which arose [45] or changed its direction [46] after the fire started, directed the fire to P's property, which it destroyed. Held, D's negligence was not a legal cause of the loss.

INDIRECT CAUSATION IN PROFESSOR BEALE'S SYSTEM.

Professor Beale's system appears to divide cases in which the causation is recognized as indirect into two major classes according as the defendant's force was or was not "active" when the intervening force was exerted.[47] If it was, then defendant legally caused the ultimate result, provided only that the intervening force was an active one caused by the defendant's force.[48] If it was not, defendant legally caused the ultimate

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[42] Kans. City R. Co. v. Lackey, 114 Ala. 152, 21 So. 444 (1897).

[43] Glover v. London & S. W. Ry., L. R. 3 Q. B. 25 (1867).

[44] Toledo R. Co. v. Muthersbaugh, 71 Ill. 572 (1874). Cf. Professor Beale's sub-head (e) under "a direct result of an active force is always proximate"; "(e) Injury caused through the subsequent action of already operating natural forces" (p. 645).

[45] Marvin v. C. M. & St. P. Ry., 79 Wis. 140, 47 N. W. 1123 (1891).

[46] Stephens v. Mutual Lumber Co., 103 Wash. 1, 173 Pac. 1031 (1918).

[47] Propositions numbered 3 and 4, p. 212 above.

[48] If one inquires, what of the intervention, after defendant's act but while his force remains active, of an active force *not* caused by his force, or of a passive force, the answer probably is—though this is not entirely clear—that those are not regarded as cases of indirect causation or intervening forces at all, but of direct causation by defendant's active force. A "result is the direct result of the active force or forces which last acted upon the immediately precedent condition" (p. 641). "Suppose upon the set stage another active force is working, whether prior to or concurrently with the force we are dealing with, the latter active force operates together with the others in bringing about the result, which is still direct" (p. 643).

result provided his force left outstanding an increased risk that such an intervening force would cause such a result, and provided further this risk remained continuously outstanding until the intervening force was applied; if defendant's force left no such risk outstanding, or if it did leave such a risk outstanding but this risk had apparently ceased before the intervening force was applied, he did not legally cause the ultimate result.

This is complicated; it is ambiguous; it seems arbitrary; and the authorities do not drive us to it.

INDIRECT CAUSATION: I. DEFENDANT'S FORCE "ACTIVELY" CAUSES INTERVENING FORCE.

The ambiguity of the word "active" is discussed above. The proposition "though there is an active force intervening after defendant's act, the result will nevertheless be proximate if the defendant's act actively caused the intervening force" [49]— introduces further ambiguities. Must the intervening force have been caused in a legal sense by the defendant's act, and must it, in turn, cause the ultimate result in a legal sense; or is it enough in each case if there is causation in a popular sense? A popular "but-for" sense seems to be the one intended. Is the proposition confined to the intervention of a single caused cause, or does it apply to a series of forces, each one caused by the preceding? I do not understand that a line is drawn at a single intervening force; and certainly no line is drawn at any other number of intervening forces. The proposition may, then, be read: If force B would not have happened but for force A, and force C would not have happened but for force B, and so on through an indefinite series (provided there is no interruption of "activity"), then the ultimate result is a legal consequence of force A.[50]

Is this the law?

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[49] Page 646.

[50] "A result, however unforeseeable, produced by a force directly or by a series of forces each acting directly on the next . . . is proximately caused by the first force." Note in 35 HARV. L. REV. 771.

A closely similar idea was expressed some years ago by Henry T. Terry: Intermediate causes which "are themselves consequences" of the principal cause "are never isolating causes." 28 HARV. L. REV. 20, 21.

Under the general proposition is presented the particular proposition that "Defendant may by his conduct so affect a person or an animal as to stir him to action; the result of such action is chargeable to defendant." [51] Suppose D seduces A's daughter, or disfigures her, and A thereupon kills the daughter. I take it that no court would treat D as a legal cause of the death; yet the case comes within both the general proposition and the particular one. Suppose D wounds P, which causes P to go to a hospital for treatment, which causes a nurse Q to minister to P, which causes P to make love to Q, which causes Q's husband R, from nervousness and irritation, to go on a reckless automobile ride, in the course of which he runs over P as P is leaving the hospital. I take it that no court would hold D a legal cause of this second injury; but the quoted propositions would require him to be held.[52] D's act did not create an appreciable risk of such an injury to P, and had a logically remote part in causing it; but the system we are examining cares nothing for that, so long as the forces which intervened between D's act and the ultimate result were "actively caused" by D's act.

But there is no occasion to be fanciful in order to refute the present propositions. Some of the very cases which the text cites as reconcilable with them seem to contradict them flatly. Regarding the act of the physician whom P employs to cure the

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[51] 33 HARV. L. REV. 646. After the citation of cases, this follows: "The defendant by his act may put some one in danger of loss (or of further loss), and that person may thus be caused to act defensively; the direct result of this defensive act is a proximate result of defendant's act. The intervening actor is usually the person whose rights are endangered by defendant's act." . . . A note on page 647 states that "There are very few authorities in conflict with the mass of cases supporting this proposition." "The intervening person may be a third person, acting either of his own motion or by employment of the person whose rights are in danger. . . . This is the basis of the responsibility of the person causing a personal injury for the act of a physician or surgeon in attempting to cure the wound" (p. 648). These propositions are accompanied by no qualification, as that the intervening action must be reasonable or foreseeable.

[52] If it is objected that these events would not occur without intermission, and therefore the requirement concerning "activity" would not be met, the answer is, first, that in various of the cases put under the present head in Professor Beale's article there is nothing to show that the events occurred without intermission; and, second, that one may suppose them, in the case put, to have so occurred.

wound which D inflicted, we read, "It is to be noted that the defendant is responsible for the physician's act only if that act is *bona fide* intended as an attempt to cure the harm inflicted by defendant. If the physician should seize the opportunity to experiment, or maliciously to harm the victim, the defendant's act would not cause the physician's." [53] This probably correctly states the law;[54] but it contradicts the general and particular propositions under discussion.[55] The text continues, "In the *Bush* case [56] the attending physician communicated scarlet fever to the defendant's victim. This was held not a proximate consequence of defendant's act." But if Professor Beale's general proposition had been applied, or the particular proposition about stirring one to action, or about the victim's defensive action, it would have been held to be such a consequence; for D's wound caused P to come into contact with the physician, and the contact with the physician caused the scarlet fever. "Nor is defendant responsible for a mistake of a nurse, employed to carry out the directions of the physician, who administers a wrong and harmful remedy." [57] The conflict with the alleged rules could hardly be sharper. They contain nothing to suggest that their application is confined to the action of doctors of medicine, or that a nurse is outside the pale of this branch of the law.

I should explain the scarlet fever case by saying that there is a strong, though not always controlling, tendency to require that the intervening action, and its effects in their general character, be in some sort foreseeable consequences of defendant's act, if his act is to be treated as a legal cause of the ultimate harm. If D wounds P he creates a risk that there may be negligence, and consequent complications, in the treatment of the

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[53] Page 649.

[54] " . . . The person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith." Sir James Stephen, Digest of Criminal Law, Art. 220.

[55] Since the defendant's act obviously *would* cause the physician's in the sense that but for the defendant's the physician's would not have occurred; and the propositions do not purport to be limited to cases in which the intervening acts are caused in a technical, legal sense.

[56] Bush v. Comm., 78 Ky. 268 (1880).

[57] Page 649.

wound; but it is very doubtful whether he creates a risk that P will contract scarlet fever, for if P is not associating with a physician he will probably be associating with someone else, and a physician going about his business of treating patients is probably not more likely, but rather less likely, to have scarlet fever and communicate it than the average member of the community. The wound which D inflicted, by causing the visit to the physician, did in fact cause the disease, but it was so unlikely to cause it that it would seem unfair to hold D for the result. A Massachusetts case in which the court refused to apply the general rule of liability for the consequences of the physician's acts, because of the extraordinary nature of the particular consequences, is *Purchase v. Seelye.*[58] A surgeon, who had been informed that plaintiff required an operation on his right side, mistook him later for another patient who required an operation on his left side, and performed the wrong operation. The court held that the injury which took plaintiff to the hospital was not the legal cause of the operation which the surgeon performed; on the ground that such a result could not have been foreseen. In this case the act of the original wrongdoer did create a greater risk than would otherwise have existed of this sort of accident, but the risk was nevertheless so small as to seem to the court negligible.

There is also a strong tendency to require that the intervening action be lawful as opposed to criminal. It is clear and familiar that the courts are more ready to make the original actor responsible for the results of the activity which he unintentionally stimulated, in the one case than in the other. This may be said to explain the cases of the irate father and of the evil-disposed or experimental physician.

In many cases defendant's act has been held not a legal cause of a result, although it "actively" caused intervening forces which caused the result; the intervening force, or the result, or both, being more or less unforeseeable. (There are also cases to the contrary.)

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[58] 231 Mass. 434, 121 N. E. 413 (1918).

(a) It has been held in a number of cases that the defendant's wrong is not a legal cause of the plaintiff's consequent defensive act and its result, if the act or the result is unforeseeable.[59]

D beat and threatened his wife, who ran out into the cold and froze to death. Held, if her action was not due to reasonable fear, D was not responsible.[60]

D wounded his wife, who left the premises and died partly from the wounds and partly from subsequent exposure. Held, if she was not obliged to suffer the exposure, D was not responsible.[61]

D furnished a defective drill for the use of P. The defect compelled P to handle hot metal to an unusual extent. To meet the situation, P invented and used a hook for handling the metal. The drill caught the hook while it was in P's hands, and P was injured. Held, D's negligence was not a legal cause of the injury, because the use of the hook was unforeseeable.[62]

D railroad negligently directed P to take the wrong train. P discovered this, and as the train was pulling out attempted, with due care, to get off. He fell and was injured. Held, D's act was not a legal cause of the injury, because P's act in getting off was an intervening cause.[63]

D railroad carried P past his station on a dark night, and misinformed him as to his distance from the station when he got off. While walking carefully along the track he fell into a cattle-guard and was injured. Held, the injury was not a legal result of D's negligent acts, but was a "pure accident." [64]

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[59] In civil cases in which the defendant escapes liability because of the *unreasonableness* of what the victims did, the decision is sometimes put on the ground of legal cause, sometimes on the ground of contributory negligence, and sometimes on both grounds. The criminal cases seem to rest on the ground of legal cause alone, as contributory negligence is not a factor. And in some civil cases the defendant escapes liability because the act of the victim, though not negligent or unreasonable, was, in the court's view, unforeseeable. It is evidently impossible to explain such cases on the ground of contributory negligence.

[60] Hendrickson v. Commonwealth, 85 Ky. 281, 3 S. W. 166 (1887).

[61] State v. Preslar, 48 N. C. 421 (1856).

[62] Stefanowski v. Chain Belt Co., 129 Wis. 484, 109 N. W. 532 (1906).

[63] Chesapeake and Ohio Ry. Co. v. Wills, 111 Va. 32, 68 S. E. 395 (1910). Cf. Newcomb v. N. Y. C. R. Co., 182 Mo. 687, 81 S. W. 1069 (1904).

[64] Lewis v. Flint R. Co., 54 Mich. 55, 19 N. W. 744 (1884).

D railroad gave P misinformation as to the time of departure of a train. This caused him to miss his train. He took an automobile to his destination, and suffered from exposure to the cold. Held, D's act was not a legal cause.[65]

D street railroad negligently carried P past a street intersection. In walking back to her destination, P fell into a hole in the street at some distance from where she got off. Held, D's act was not a legal cause of the injury, because the hole in the street was an intervening cause.[66]

There are cases on both sides of the question whether one who is responsible for a fire is responsible for injuries sustained in trying to put it out. Responsibility is frequently denied, on the ground that the intervening act—the effort to put out the fire—was not foreseeable.[67]

(b) Similarly in cases of intervening action caused by the defendant's act, other than the defensive action of the plaintiff, it is sometimes held that defendant's act is not a legal cause of the intervention and its results.

P's property was destroyed by a back-fire set by X to stop a fire set by D. Held, D's fire was not a legal cause of P's loss.[68]

D's train struck an automobile and threw it against a switch. This opened the switch, and caused the train to go down a side-track and injure A, a passenger, by the resulting collision. Held, D's negligence, if any, was not a cause of the injury, because it could not have been foreseen that the automobile would be thrown against the switch.[69]

D asked P to repair a leaky tank car, and P undertook to do so. D told P the car contained unrefined naphtha. It contained gasoline, which exploded, injuring P. The car bore a warning against removing a cap, and

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[65] Weeks v. G. N. Ry. Co., 43 N. D. 426, 175 N. W. 726 (1919).

[66] Morris v. Omaha St. Ry. Co., 193 Iowa 616, 187 N. W. 510 (1922).

[67] Logan v. Wabash Ry. Co., 96 Mo. App. 461, 70 S. W. 734 (1902); Pike v. Grand Trunk Ry. Co., 39 Fed. 255 (1889); Seale v. Gulf Ry., 65 Tex. 274 (1886); Gulf Ry. v. Bennett, 219 S. W. 197 (Tex., 1920). Cases on both sides are collected in a note, 15 L. R. A. (N. S.) 819.

[68] Marvin v. C. M. & St. P. Ry., 79 Wis. 140, 47 N. W. 1123 (1891).

[69] Engle v. Director General of Railroads, 133 N. E. 138 (Ind. App. 1021).

P violated this warning. Held, D's act was not a legal cause of the injury, because P's act could not have been foreseen.[70]

A machine became clogged by the negligence of D. A, whose duty it was to keep the machine working, in trying to fix it, slipped against a revolving set-screw nearby and was killed. Held, D's negligence in operating a defective machine was not a cause, but only a "condition," of the death.[71]

The courts have usually refused to hold a man who inflicted an injury for the consequences of negligence on the part of a physician in treating the injury, if the defendant himself selected the physician and used reasonable care in doing so.[72]

D attacked A and others. A, in resisting the attack, killed B. Held, D did not cause the death of B.[73]

(c) In the following cases, in which the defendant's act was held not a legal cause, defendant's force perhaps did not "actively" cause the intervening force, in the sense of producing continuous change up to the time the intervening force was applied; but, as we have seen, this is also true of many of the cases put by Professor Beale as illustrations of "active" causation. Cases of strictly continuous change are not common. The intervening act was clearly caused, in the following cases, by defendant's act, in the sense that but for his act the intervening act would not have happened; and in some of them the interruption (if any) in "activity" was very slight.

D allowed gasoline to escape, and boys promptly threw lighted matches into it to make it burn. Held, *inter*

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[70] Clement v. Gulf Ry. Co., 236 S. W. 714 (Com. of App. of Tex., 1922).

[71] Wis. & Ark. Lumber Co. v. Scott, 53 Ark. 65, 239 S. W. 391 (1922).

[72] Secord v. St. Paul, M. & M. Ry. Co., 18 Fed. 221 (1883); Eighmy v. Union Pac. R. Co., 93 Iowa 538, 61 N. W. 1056 (1895); note in 8 A. L. R. 506, 515.

[73] Commonwealth v. Campbell, 7 All. 541 (Mass., 1863); Butler v. People, 125 Ill. 641, 18 N. E. 338 (1888); Commonwealth v. Moore, 121 Ky. 97, 88 S. W. 1085 (1905). *Contra*, Taylor v. State, 41 Tex. Crim. R. 564, 55 S. W. 961 (1900). These cases are noted by Professor Beale, page 649, as in conflict with his rules.

alia, the act of D was not a legal cause of the fire, as the action of the boys was unforeseeable.[74]

D told P that D's train made connections at X with a train to P's destination. On reaching X and finding that there was no connection, P walked 300 yards to a house, waited four hours in great anxiety, and then hired a team, which took her over a rough road and through a storm to her destination several miles away. P suffered a miscarriage in consequence. Held, D's act was not a legal cause of P's injuries after she left X. "It might reasonably have been anticipated that a failure to make the connection . . . would involve delay and inconvenience, but not that the plaintiff would procure a buggy, and, in the face of a storm, in her delicate condition, drive over a rough road to her father's house, and that a miscarriage would be the result." [75]

P was carried past his transfer point by D railway, and given a ticket to ride back to it. He waited while cars passed without stopping, and then began to walk back to the junction on D's right of way. He stumbled and was injured. Held, D was not liable, because the result was not foreseeable.[76]

A car on D's train was derailed by reason of negligence in the maintenance of the track, and drawn bumping over the ties, while P was rightfully beside the track. P was frightened, and tried to get farther from the track, but stumbled and rolled to a point where the car struck her. Held, D's negligence was not a legal cause of the injury, because injury produced in this way could not have been foreseen.[77]

D, by negligence in the maintenance of a track, caused the derailment of a car in its mine. P was injured in helping to put it back. Held, the negligence was not a legal cause of the injury, because no injury produced in this way was likely.[78]

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[74] Moody v. Gulf Refining Co., 218 S. W. 817 (Tenn., 1920).

[75] Fowlks v. So. Ry. Co., 96 Va. 742, 32 S. E. 464 (1899).

[76] Kelson v. Public Service R. R. Co., 110 Atl. 919 (N. J. Ct. of Errors and App., 1920).

[77] Donald v. Long Branch Coal Co., 86 W. Va. 249, 103 S. E. 55 (1920).

[78] Cavanaugh v. Centerville Block Coal Co., 131 Iowa 700, 109 N. W. 303 (1906).

INDIRECT CAUSATION: II. DEFENDANT'S FORCE "AT REST" WHEN INTERVENING FORCE IS APPLIED.

Professor Beale tells us that if defendant's force had "come to rest" before the intervening force was applied, then defendant legally caused the ultimate result provided his force left outstanding an increased risk that such an intervening force would cause such a result, and provided further this risk remained outstanding until the intervening force was applied; but if his force left no such risk outstanding, or if such a risk had apparently ceased for an interval before the intervening force was applied, then he did not legally cause the result.[79]

This introduces ambiguities which are not new in the law, but are fatal to any definiteness in the proposed rules. How serious must the risk be; is it enough if the likelihood of the intervening force causing the harm is increased in an infinitesimal degree, or must it be increased in an appreciable degree, or in a substantial degree, or in a degree so substantial as to deter a prudent person from acting as D acted? Whose judgment is the measure of the risk; the judgment of D, or of a reasonable person with D's information, or of a reasonable person with D's means of information, or of an omniscient person, or of the trier of the fact? As of what time is the risk to be judged; the time of D's action, or the time when his force "came to rest," or the time of the trial? Is the "foreseen danger" a danger of the intervention of the identical force which does intervene, or is it enough if there is danger of the intervention of a force of similar character; and if the latter, how closely similar must it be? Must the loss which is risked be the identical loss which occurs, or is it enough if there is a risk of loss of a similar character; and if the latter, how closely similar?

To illustrate, take the facts in *Clark v. Chambers*.[80] D placed a pointed barrier across a roadway; X removed it to the adjoining footpath, and stood it upright there; P, using the footpath in the dark, ran into it and put out an eye. Was this a

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[79] 33 HARV. L. REV. 650, 651; proposition 4 above, p. 212.
[80] L. R. 3 Q. B. D. 327 (1878).

"risked loss"? Was it produced by a "foreseen danger"? As Professor Bohlen says, "The wrong took effect in injury in a manner exceedingly difficult for any man to have foreseen." [81] Yet D was held liable. Suppose X had hurled the barrier to a path twenty feet above the road, and P had run into it there; or X had rolled it downhill, and its momentum had carried it up another hill and P had run into it there; or X had carried it to an adjoining field and chopped it to pieces, and a flying fragment had struck P. Would these occurrences make D liable within the present rules? It is impossible to say. It depends upon how the rules are interpreted with respect to the degree of risk required, and the degree in which the events risked—immediate and ultimate—are required to be the specific events which occur.

As the foregoing questions suggest, the present rules would remain highly indefinite even if the fundamental difficulty of distinguishing a force which has "come to rest" from one which is still "active" were eliminated. It is difficult to test them by applying them to concrete cases, or to criticise them otherwise than by pointing out that they are indefinite. By answering in various ways the questions suggested, the rules may be made either to fit or to misfit a variety of cases; on the other hand, no reason appears for supposing that any particular set of answers would make the rules, considered as rules both of inclusion and of exclusion, fit all or nearly all cases.

Undoubtedly if the questions are answered in the narrowest and strictest way, the result is a moderately definite rule; to the effect that if, from D's own point of view at the time he acted, his act produced such a risk as should deter a reasonable person, that the very force which did intervene would cause the very loss which occurred, D has legally caused the loss. Probably no one would question this as a rule of inclusion; but such a rule would solve only occasional cases, and would therefore be of limited use even as a rule of inclusion; while as a rule of exclusion it would be entirely worthless, since legal cause is very often found to be present in cases which do not meet such severe

[81] 49 AM. L. REG. 84.

requirements in regard to foreseeability or risk. To make the rules broad enough to include many cases, it is necessary to answer some of the questions with language so ambiguous as to leave the rules highly indefinite. For example, if, from the point of view of a reasonable man (an indefinite idea) with D's information, D's act produced a substantial risk (an indefinite idea) that a force of the general character of that which intervened (an indefinite idea) would cause harm of the general character of that which occurred (an indefinite idea), D's act is a legal cause of the harm; otherwise it is not. But this is not merely indefinite; while many cases support it, there are many to the contrary. An act is often (though not usually) held not to be a legal cause when this mild variety of foreseeability is present; and an act is sometimes held to be a legal cause when it is not present.

Sometimes a court requires a very precise sort of foreseeability and a high degree of risk. The following are cases in which, from the point of view of a reasonable person with D's information, considering the matter at the time D acted, D's act produced at least a substantial risk that an intervening force, of the general character of that which intervened, would intervene and cause harm of the general character of the harm that was caused; in which there had not ceased to be such a risk (defendant's act had not "come to rest in a position of apparent safety"); and in which the court refused to hold D as having legally caused the harm. In most of these cases the court declared that the intervening force, or the ultimate injury, could not have been foreseen.

> D wrongfully left explosives in an unlocked box in a public place. Boys took them and by their experiments produced explosions which killed other boys. The Massachusetts court in 1914, and the New York court in 1916, held that D's act was not a legal cause of the deaths.[82]

[82] Horan v. Watertown, 217 Mass. 185, 104 N. E. 464 (1914); Perry v. Rochester Lime Co., 219 N. Y. 60, 113 N. E. 529 (1916). There are cases reaching opposite results on comparable facts. L. R. A. 1915 E 479.

In neither case was there any doubt of the wrongfulness of D's act; it was in violation of an ordinance in each case, and was negligent in the Mas-

D railroad negligently and in violation of statute left barrels of oil standing on its platform, which was soaked with oil. X, bringing goods to the platform for shipment, lit his pipe and threw the lighted match under the platform. This set fire to it, and the fire spread to the oil in the barrels, and so to P's property across the street. Held, D's act was not a legal cause of the loss; the intervening act must be such a consequence as ought, according to the usual experience of mankind, to have been anticipated; it is not enough that it is "merely possible according to occasional experience." [83]

D telephone company maintained a guy-wire from one of its poles toward the travelled part of the road. The embankment in which it was fixed was only six inches higher than the roadway. P's mules, frightened by an automobile, ran up against the wire, injuring P. Held, the wire was not a legal cause of the injury, because the precise chain of events was not foreseeable.[84]

D negligently maintained a telephone pole without proper support, and it fell across the road. A traveller propped it up, and it afterward fell upon A and killed her. Held, D's negligence was not a cause of the death, because the intervention of the traveller was unforeseeable.[85]

D allowed a wire to hang close to the ground, at the side of a road and near a hedge. P's horses went over to the hedge and against the wire during a storm, and were struck by lightning conducted by the wire. Held, D's act was not a legal cause, because the intervening events were not foreseeable.[86]

D negligently left a live wire hanging in a street. A policeman struck it with his club and knocked it against A. Held, D's negligence was not a legal cause of A's injury, because the policeman's act could not have been foreseen.[87]

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sachusetts case. Each court relied on what it considered the unlikelihood of the particular series of events which intervened between D's act and the injury. Each court relied in part, but neither relied exclusively, on the wrongfulness of the intervening acts.

[83] Stone v. B. & A. R. Co., 171 Mass. 536, 51 N. E. 1 (1898).

[84] Eberhardt v. Glasco Mut. Tel. Assn., 91 Kans. 763, 139 Pac. 416 (1914).

[85] Harton v. Telephone Co., 146 N. C. 429, 59 S. E. 1022 (1907).

[86] Simon v. Mo. & Kans. Tel. Co., 97 Kans. 42, 154 Pac. 242 (1916).

[87] Seith v. Com. Electric Co., 241 Ill. 252, 89 N. E. 425 (1909).

D maintained an uninsulated electric wire on a pole. P went up to repair the line of another company and touched D's wire. Held, D's act was not a legal cause of the accident, because the accident was unforeseeable.[88]

D maintained a defective hitching post. A's horse ran away and struck B's team, which was hitched to the post; B's team broke the post, ran several blocks, and struck P. Held, *inter alia*, that the condition of the post was not a legal cause of the injury.[89]

D, a building contractor, violated a statute requiring floors to be laid on the first and second stories of a building before adding the third story. A, working on the third story, fell and was killed. Held, *inter alia*, that while the violation of statute made A's work "more hazardous, it was not a cause contributing to the accident but a condition of it and therefore did not render the defendant liable." [90]

D negligently allowed barbed wire to lie in water six or eight feet deep, which it maintained for boating purposes. A motorboat driven by X, and racing, negligently ran down and upset canoeists; A dived to rescue one of the canoeists, got tangled in the wire, and was drowned in consequence. Held, the wire was not a legal cause of the death, because the precise chain of events which led to the death was not foreseeable.[91]

D, a ranch-owner, negligently failed to provide P, a sheep-herder, with sufficient fuel for his camp; P therefore had to go to bed on a stormy night to keep warm; his sheep wandered away in consequence; P set out next morning to find them, while the storm still raged, and was frozen. Held, D's negligence was not a legal cause, because P's act in going after the sheep during the storm was unforeseeable.[92]

D shipped oil in a tank-car not provided with a valve in the cap. In consequence, when the consignee removed the cap, the oil flowed out and could not be checked. It

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[88] Washburn v. Laclede Gaslight Co., 223 S. W. 725 (Mo., 1920). See 214 S. W. 410.

[89] City of Rockford v. Tripp, 83 Ill. 247 (1876).

[90] Farrell v. B. F. Sturtevant Co., 194 Mass. 431, 80 N. E. 469 (1907).

[91] Sarber v. Indianapolis, 72 Ind. App. 594, 126 N. E. 330 (1920).

[92] Lemos v. Madden. 200 Pac. 791 (Wyo., 1921).

flowed into P's boiler-room close by, and P's property was destroyed by fire. Held, *inter alia,* D's negligence was not a legal cause of the loss, because it did not "necessarily" set the other causes in motion.[93]

D's negligent maintenance of its streets caused P to fall. In consequence of the fall, P was subject to periods of dizziness. During such a period, he slipped and fell again. Held, D was not liable for the consequences of the second fall, because that fall was not probable.[94]

Sometimes the mere fact that the act (commonly, the negligent or otherwise wrongful act) of a third person intervened between D's act and P's injury is held to relieve D of liability irrespective of foreseeability; though such decisions are relatively uncommon.

D railway neglected to fence its tracks pursuant to an ordinance. P crossed D's tracks, and stood between them and the adjoining tracks of the X company, when he was hit by a passing train of the X company. Held, D's neglect was not a legal cause of the injury, because the independent act of the X company intervened.[95]

A car which lacked the drawbar and coupler required by statute was standing on a track of the D railway. A, an employee, was killed by being crushed between this car and a shunted car on which he was riding. A's job was to stop his car before it reached the other. Held, *inter alia,* the defective car was not a legal cause of the accident, because the failure of A to stop the car on which he was riding was an intervening cause.[96]

P, after getting off D's street car at a place where the car should not have stopped, was struck by the motorcycle of X. Held, D was not liable, as acts for which D was not responsible intervened between D's act and P's injury.[97]

D negligently permitted the complete obstruction of a sidewalk. P, a pedestrian, forced into the street, was struck by a negligently driven vehicle. Held, D's negligence was

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[93] Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400 (C. C. A., 7th, 1894).

[94] Watters v. Waterloo, 126 Iowa 199, 101 N. W. 871 (1904).

[95] Curran v. C. & W. I. R. Co., 289 Ill. 111, 124 N. E. 330 (1919).

[96] Lang v. N. Y. C. R. Co., 255 U. S. 455 (1921).

[97] Hammett v. Birmingham R. L. & P. Co., 202 Ala. 520, 81 So. 22 (1918).

not a legal cause of the injury, because the act of the driver was an intervening cause.[98]

D, a station master, started trains too close together. This caused a signalman to become confused as to which trains were in a tunnel, and the signalman consequently directed the trains so that a wreck resulted. Held, D was not responsible for the wreck, by reason of the intervention of the other causes.[99]

D erected an 800-pound cornice at the top of a building so badly that it "would by natural action of the elements and from natural causes alone and by reason of its own weight and insecure fastening" fall to the sidewalk. The fastenings rotted and rusted in consequence; the owner of the building negligently failed to inspect and remove the cornice; and it fell upon A and killed him. Held, D's negligence was not a legal cause of the death, because the negligence of the owner of the building, and the passage of time, intervened between D's act and the accident.[100]

Professor Beale mentions and criticizes the tendency of courts to relieve a defendant from liability "where a criminal, or as it is often put, an illegal act of another, intervenes after the defendant's act." [101]

The views represented by the foregoing cases are far from universal. Frequently a court is satisfied with a very slight degree of risk, or a very general sort of foreseeability, or both; that is, a slight degree of risk that a force only broadly similar to that which actually intervenes, will intervene and cause harm only broadly similar to that which actually results.

A leading case of this sort is *Clark v. Chambers.*[102]

Another leading case is *Smith v. London & S.W.Ry.Co.,*[103] in which it was decided that a railroad which negligently started a fire along its line was responsible for the destruction of prop-

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[98] Jones v. Ft. Dodge, 185 Iowa 600, 171 N. W. 16 (1919). *Contra,* Shafir v. Sieben, 233 S. W. 419 (Mo., 1921).

[99] Queen v. Ledger, 2 Fost. & F. 857 (1862).

[100] Howard v. Redden, 93 Conn. 604, 107 Atl. 509 (1919). The court also relied in part on the fact than D was a contractor.

[101] 33 HARV. L. REV. 657.

[102] L. R. 3 Q. B. D. 327 (1878), discussed above, pp. 231, 232.

[103] L. R. 6 C. P. 14 (1870).

erty so far from its line that a reasonable man might well have failed to anticipate that the fire would reach it.[104]

D negligently permitted a ditch in a street. P's carriage ran into the ditch and was disabled; and P was exposed to so much cold and rain in getting another carriage that he contracted a permanent disease of the spine. Held, the ditch was a legal cause of the injury, even though "nothing short of omniscience could have foreseen for a minute what the result and effect of driving into this ditch would be." [105]

D hung a sign across a street, with reasonable care but in violation of an ordinance. A "gale of extraordinary violence" blew it down, injuring P's property. Held, D's act was a legal cause.[106]

D railroad blocked a highway with its train and so delayed a physician on his way to treat P. Held, D's act was a legal cause of the delay and its consequences to P.[107]

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[104] It may well be asked in connection with this case, how can an act be negligent towards A if a reasonable man would anticipate no harm to A as likely to result from the act? If A is outside the radius within which harm is probable, is he not also outside the group of persons as to whom the act violates a duty of care? The answer would seem to be that harm to A may be so unlikely that a prudent man would not be deterred by the likelihood of that harm, considered by itself, from acting as D acted, and yet there may be a *slight* chance of harm to A; and it may well be that this slight chance of harm is enough, in combination with equal or less or greater chances of harm to persons or property differently situated, to deter a prudent person from doing the act. The act is then negligent; and, if negligent, it would seem to be negligent as to every subject-matter which plays a part, however slight, in making it so; in other words, it violates a duty of care toward A, among others. The risk of injury to B, C, and D may be both greater than the risk of injury to A, and also so great that D's act would be negligent independently of the risk to A; but this does not prevent the act from being negligent as to him—somewhat as a wound inflicted by X is no less a cause of the victim's death for the fact that contemporaneous wounds contributed by Y and Z were both deeper and quite sufficient to do the work. It is enough to make D's act negligent as to A—the violation of a duty of care to A—that the risk of injury to one in A's situation is one of the risks which, added together, make it unreasonably risky to do the act. The court probably did not mean that injury to the plaintiff from a negligently-set fire would have seemed impossible, but only that the risk of that injury would have been too slight, standing alone, to deter a prudent person from taking the chances that D took.

[105] Ehrgott v. Mayor of New York, 96 N. Y. 264 (1884).

[106] Salisbury v. Herchenroder, 106 Mass. 458 (1871). Sometimes a broader view of legal cause is taken when D's wrong was a violation of a statute than when it was a negligent act; 25 HARV. L. REV. 235.

[107] Mrs. A. H. Terry v. New Orleans R. R. Co., 103 Miss. 679, 60 So. 729 (1913).

D made fraudulent misstatements about the stock of a corporation, which induced P to keep his stock instead of selling it. Thereafter embezzlement by an officer of the corporation deprived the stock of most of its value. D was held liable for the loss in value.[108]

D negligently strung a wire across a road at a height of eleven feet. P drove over the road on top of a loaded wagon, carrying a loaded gun. He was knocked off by contact with the wire, the gun was discharged, and P was shot. Held, this was a legal consequence of D's act.[109]

D negligently built structures in a creek-bed, using insecure foundations. An extraordinary flood, "such as could not reasonably be contemplated by the parties," washed the structure into the creek, to P's damage. Held, D's negligence was a legal cause of the damage.[110]

Is it not clear that different courts, and the same courts in different cases,[111] reach very different results in view of a given degree of risk or foreseeability?

"Apparent Safety."

Probably Professor Beale's most helpful suggestion is that regarding apparent safety: ". . . where defendant's active force has come to rest in a position of apparent safety, the court will follow it no longer; if some new force later combines with this condition to create harm, the result is remote from defendant's act." [112] There seems to be a distinct tendency in this direction. But "apparent safety" means apparent absence of risk; accordingly, the question raised above—what degree of risk, what

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[108] Fottler v. Moseley, 185 Mass. 563, 70 N. E. 1040 (1904).

[109] Walmsley v. Rural Tel. Assn., 102 Kans. 139, 169 Pac. 197 (1917).

[110] Williams v. Columbus Producing Co., 80 W. Va. 683, 93 S. E. 809 (1917).

"Where, although defendant was in fault, yet no damage would have resulted but for an occurrence in the natural world, which constituted an extraordinary departure from the usual course of nature . . .. there is a remarkable conflict of authority. Some courts would order a verdict for the defendant, and others for the plaintiff." Professor Smith, 25 Harv. L. Rev. 321.

[111] Cf., *e. g.*, the Massachusetts cases, or the New York cases, cited above on the present topic.

[112] Page 651.

sort of risk, "apparent" to whom and at what time—again arise, and deprive the formula of anything like definiteness.[113] Moreover, the proposition regarding apparent safety should, it is submitted, be stated only as a tendency, not as a rule. Like most propositions about legal cause, it is not true for all cases. Suppose D offers A $1000 if he will kill B. A, a reputable person, indignantly rejects the offer. It would seem that "defendant's active force has come to rest in a position of apparent safety." But an hour later X, a creditor of A, puts such pressure on A that A decides to, and does, kill B in order to get D's $1000. There can be no doubt that D is guilty of murder.[114] Nor is it necessary to go to criminal cases, or cases of intended results, for instances in which the risk of injury from defendant's act has become extremely attenuated—quite as attenuated as in the explosives cases—and yet D is held liable for subsequent consequences. Take the New York case of *Ehrgott v. Mayor*.[115] When P was thrown out of his carriage there was shelter nearby, and it would seem that D's force then came to rest in a position of apparent safety except with regard to developments of the physical injuries which P had then suffered; yet the court held D liable for the consequences of P's subsequently getting cold

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[113] For example, Professor Beale says: "Defendant gives a child . . . something which by exploding would cause injury . . . ; he is a proximate cause of any injury the child may do with it, so long as it remains in his hands . . . If the explosive gets into the hands of an adult the defendant's force has ceased to be an active danger; if the explosive thereafter gets into the hands of a child, defendant is not the proximate cause of anything this child may do with it" (p. 656). Now the danger is ordinarily much reduced when the explosive gets into the hands of an adult; but it may be very little reduced, as, if the adult is a person of poor judgment, or a careless or indulgent person; and even if the adult is a reasonable person, the danger is not eliminated. The reasonable adult may be, and commonly is, little given to acquiring and storing explosives; but for the defendant's act, there would be no explosives in the place where the adult puts them; and their presence in that place is almost certain to involve some risk of harm, including a risk that boys will play with them. Has defendant's force come to rest in a position of apparent safety? In some senses of the words, yes; in some senses, no.

[114] It may be suggested that the case is explained by the facts that D's act was a crime, and that the result which occurred was the result he intended; but Professor Beale does not suggest that such circumstances or any others constitute exceptions to the rule that the defendant is relieved of liability when his force has come to rest in a position of apparent safety.

[115] 96 N. Y. 264 (1884), stated above, note 105, p. 238.

and wet in hunting up another carriage and driving home. Similarly in the Massachusetts case of *Fottler v. Moseley;*[116] for three months after D had wrongfully misled P into retaining the stock which he owned, the value of the stock remained practically stationary, and it might well be said that D's force had come to rest in a position of apparent safety between the end of March, when D acted, and the end of June, when the corporate officer's embezzlement came to light and the value of the stock fell. Yet D was held liable for the whole fall in the value of the stock.

Definite Rules Impossible.

Jeremiah Smith considered the several attempts that had been made, at the time he wrote, to make the law of causation definite and certain, and showed that they had all "resulted in propounding rules which are demonstrably erroneous."[117] If Professor Beale's effort to achieve definiteness has had no greater success, the conclusion that the subject is not capable of reduction to definite rule is fortified.

And if it is not capable of reduction to definite rule, that fact is neither peculiar nor peculiarly unfortunate. Within limits, all legal concepts are indefinite. "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."[118] Many legal concepts are highly indefinite. What is a criminal attempt? What is fraud? What distinguishes the corporate or proprietary from the public or governmental functions of a municipal corporation? To the protest that in so fundamental a matter as the law of causation, at least, we cannot get on without definiteness, there are various answers. One answer is that we have got on without it for some time. That, of course, is nothing against introducing definite rules, if definite rules can be devised which will fit the cases or serve the purposes

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[116] 185 Mass. 563, 70 N. E. 1040 (1904); stated above, note 108, p. 239.

[117] 25 Harv. L. Rev. 317.

[118] Mr. Justice Holmes' dissent in Lochner v. New York, 198 U. S. 45, 76 (1905).

of the law; but the very breadth and depth of the subject should prepare us for the fact that no such rules can be devised. Human conduct and its consequences are infinitely various. An endless variety of circumstances raise the two parallel questions, was A's conduct wrongful, and was it a legal cause of B's injury. We recognize the impossibility of inventing a machine which will give either a just or a legal answer to the first question.[119] Why should we hope for greater definiteness in regard to causation than in regard to wrongfulness? Certainty is no more attainable in the one branch of the law of wrongs than in the other. Neither the actual decisions nor the ends of justice permit any considerable part of the field to be covered with specifications that circumstances of this or that variety meet the requirements of legal cause. The field is one in which intelligence cannot accomplish a decent result without the aid of intuition. To quote from a recent essay of Dean Pound:

> ". . . rules of law and legal conceptions which are applied mechanically are more adapted to property and to business transactions; standards where application proceeds upon intuition are more adapted to human conduct and to the conduct of enterprises. . . . Where the call is for individuality in the product of the legal mill—*i. e.*, where we are applying law to human conduct and to the conduct of enterprises—we resort to standards and to intuitive application. And the sacrifice of certainty in so doing is more theoretical than actual. The instinct of the experienced workman operates with assurance. Innumerable details and minute discriminations have entered into it, and it has been gained by long experience which has made the proper inclusions and exclusions by trial and error until

[119] We recognize, *e. g.*, that it is neither possible nor desirable to cover any considerable part of the field with specifications that conduct of this or that particular variety is, or is not, negligent. Reasonable care may sometimes require the driver of a vehicle to stop, as well as look and listen, before he crosses a railroad; but it is unfortunate to lay down a rule that a failure to stop is always negligent, or that a passenger, as well as the driver, must always look and listen. Cf. Cardozo, A Ministry of Justice, 35 HARV. L. REV. 113, 120. The question of negligence is at bottom the question what is appropriate and just in particular circumstances; a highly indefinite question. "It is no more possible to treat negligence in the abstract than rheumatism in the abstract." (Pound, The Theory of Judicial Decision, 36 HARV. L. REV. 940, 945.)

> the effective line of action has become a habit . . . conveyance of land, inheritance and succession, and commercial law have always proved susceptible of legislative statement, while no codification of the law of torts and no juristic or judicial defining of fraud or of fiduciary duties has ever maintained itself. In other words, the social interests in security of acquisitions and security of transactions—the economic side of human activity in civilized society—call for rule or conception authoritatively prescribed in advance and mechanically applied. . . . Titles to land and the effects of promissory notes or commercial contracts cannot be suffered to depend in any degree on the unique circumstances of the controversies in which they come in question. . . . On the other hand, where we have to do with the social interest in the individual human life and with individual claims to free self-assertion subsumed thereunder, free judicial finding of the grounds of decision for the case in hand is the most effective way of bringing about a practicable compromise and has always gone on in fact, no matter how rigidly in theory the tribunals have been tied down by the texts of codes or statutes." [120]

Complete certainty in the law of wrongs, besides involving far greater disadvantages, would involve far less countervailing advantages than certainty in commercial law or the law of property. People make contracts and conveyances for the purpose of producing legal, as well as practical, effects; and the practical effects themselves depend largely upon the legal. In order to select one's course in regard to contracts and conveyances, it is therefore of the first importance to know in advance what their legal effects will be. But torts and crimes are (usually) neither done nor suffered for the purpose of producing legal effects. They produce important practical effects independently of the law; they are usually committed either for the purpose of producing these effects, or casually; and they are usually suffered casually. People can, and usually do, regulate their conduct where crimes and torts are concerned largely on the basis of practical effects. There is, then, *comparatively* little need, from the point of view of the individual or of society, for enabling a

[120] 36 HARV. L. REV. 951-952, 956-957.

man to determine in the light of exact information concerning liability for consequences whether or not to commit a crime or a tort. Nor is it necessary to enable people to determine, in the light of such information, whether to be assaulted or run down by automobiles. And as between the question whether an act is wrongful, and the question how far one is liable for the consequences of a wrongful act, there is far less need for certainty in regard to the second than in regard to the first.

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(To be Concluded.)